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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO. ___ _____

STATE OF NEW JERSEY,

Respondent,

v.

JAMES H. HALL, JR.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

STUART SURICK, ESQUIRE
Attorney for Petitioner
3735 Lawrenceville Road
Princeton, New Jersey
08540

I

QUESTIONS PRESENTED

1. Whether the courts of the State of New Jersey have jurisdiction under the Fourth Amendment of the United States Constitution to create a procedure whereby a citizen can be compelled to submit to a lineup on less than probable cause.

2. Whether, under the Fourth Amendment of the United States Constitution, the Courts of the State of New Jersey can employ a procedure whereby a citizen can be compelled to submit to a lineup on less than probable cause, be in fact deprived of his liberty without arrest or indictment, and without rights to bail or Miranda warnings.

3. Whether a procedure may be employed whereby a citizen is detained, seized, and compelled to submit to a lineup on the bare allegations of a police officer, on less than probable cause, without an opportunity prior to the detention to confront his accusors to show mistake, suggestion, or lack of credibility.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Reasons for granting the petition	15
Conclusion	30
Appendix A	1a

TABLE OF AUTHORITIES

CASES

	Page
Davis v. Mississippi, 394 U.S. 721 (1969).	12, 19
Dunaway v. New York, 442 U.S. 220 (1979)	22
Illinois v. Lance Gates, 51 U.S.L.W. 4709 (U.S. June 8, 1983)	25
Michigan v. Summers, 452 U.S. 692 (1981)	22
People v. Brown, 459 N.Y.S.2d 227 (Co. Ct. 1983)	27
Spinelli v. United States, 393 U.S. 410 (1969)	26
State of New Jersey v. Schweitzer, 171 N.J. Super. 32 (Law Div. 1979)	10, 11, 16
Terry v. Ohio, 392 U.S. 1 (1968)	21, 25
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	25
United States v. Place, 51 U.S.L.W. 4844 (U.S. June 21, 1983)	24
Wise v. Murphy, 275 A.2d 205 (D.C. App. 1971)	16

CONSTITUTION AND STATUTES

New Jersey Constitution (1947), Article I, paragraph 7	14
New Jersey Constitution (1947), Article VI, Section 3, paragraphs 2 and 3	12
United States Constitution, Fourth Amendment.	25, 28
United States Constitution, Fifth Amendment..	25
United States Constitution, Fourteenth Amendment	28
28 U.S.C.A. 1257 (3)	1

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PETITION FOR A WRIT OF CERTIORARI
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JAMES H. HALL, JR. petitions for a Writ of Certiorari to review the judgment of Supreme Court of New Jersey in this case.

OPINION BELOW

The opinion of the Supreme Court of New Jersey (App. A, infra, 1a-38a) is reported at 93 N.J. 552 (1983).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The opinion below was issued on July 14, 1983.

STATEMENT

In the early morning hours of February 3, 1983, an armed robbery was alleged to have taken place in the home of James Bailey and Louis Campanelli in Cliffwood Beach, New Jersey. Bailey and his girlfriend, Stacy Dillon, eventually related the following series of events to the police: They had just arrived at the home when two male intruders appeared, one white and one black. The white male demanded that Bailey produce ten pounds of marijuana that he believed was in the house. Bailey explained that he did not have the marijuana but that Michael Huff, from whom he had purchased nine ounces of marijuana, did have it. Bailey then turned over the nine ounces of marijuana. The two intruders then began an extensive

search of the home. One of them took Bailey's wallet. The black man took Dillon to a front room and tied her hands. Later she was taken into the bedroom and tied to Bailey. As the two intruders were leaving, one of them told Bailey that they would return Bailey's television and stereo when they received money owed to them by Michael Huff. Five minutes later, Dillon and Bailey freed themselves and phoned Bailey's roommate, Louis Campanelli.

After learning of the robbery, Campanelli, Huff and two other friends arrived at the house. Later, the police were called. When the police arrived, the two victims described the robbery, but omitted to mention the drugs.

Ten days after the robbery, Detective Joseph Booket of the Aberdeen Town-

ship Police Department called Bailey and Dillon and requested that they come to the police department to assist in the preparation of composite sketches of the two perpetrators. (3T129-1 to 130-1, 3T198-9; 3T263-5 to 12.)[1/]

On April 3, 1978, Louis Campanelli was interviewed by Detective Kenneth Wicklund of the Aberdeen Township Police Department. Detective Wicklund's report, dated April 3, 1978, made in connection with that interview, stated, "This Hall hold up was over a drug rip off." Wicklund admitted that Mr. Hall was not

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1/ 2T refers to the transcript of the motion to compel defendant's participation in a lineup; 3T refers to Volumes I and II of the trial transcript. 6T refers to the post-trial proceedings of January 28, 1980. Da refers to the appendix of the defendant's brief before the Superior Court of New Jersey, Appellate Division.

a suspect at that time and that his name was never even mentioned, but stated that the "Hall" hold up was intended to be the "whole" holdup. (3T508-1 to 10; 3T14-19 to 25).

In or about early April, 1978, Michael Huff was interviewed by Detective Booket. Huff advised Booket that the robbery was related to a drug transaction. At the interview, Huff viewed the composite and stated that the white male resembled John Beqnis who had left for the State of Mississippi in a U-Haul on February 3, 1978, shortly after the robbery. The police did nothing further to trace Bennis. (3T286-22 to 288-10). Although the police had in their possession a photograph of John Bennis (3T312), it was not shown to Bailey or Dillon (3T288).

After interviewing Michael Huff on

April 7, 1978, Detective Booket called Bailey and Dillon back to the police department. Bailey and Dillon then admitted to the drug transaction. (3T290-22 to 3T291-9). Neither Bailey, Dillon nor any of their cohorts were arrested, indicted or otherwise punished under the laws of New Jersey for their admitted crimes.

On April 12, 1978, Louis Campanelli, Bailey's roommate, told Detective Booket about his involvement in a transaction involving ten pounds of marijuana. Campanelli advised Booket that he had informed one Dennis Miseje of the pending transaction on January 24, 1978. (Da4-1 to 10).

In May of 1978, Detective Booket was advised by a Detective from the Carteret Police Department that an informant

had seen James Hall in the company of Dennis Miseje, and that the informant, after observing a composite of the perpetrators, identified one of the persons depicted as James Hall. (Da-4-16 to 21).

On June 6, 1978, four months after the incident, Detective Booket requested that Bailey and Dillon come to the police headquarters to view a photo array containing Mr. Hall's photograph. Dillon identified a photograph of Michael Gonshark as "looking like" the perpetrator. (3T56-15 to 58-10). Bailey stated that the photograph of Mr. Hall resembled the perpetrator, but that he was not positive. (Da5).

The Monmouth County Prosecutor then moved for an order compelling Mr. Hall to appear in a lineup. In support of the motion, the Prosecutor relied entirely on

the affidavit of Detective Booket. The affidavit related, in pertinent part: (1) that an alleged unidentified informant, who had not otherwise been shown to be reliable, had identified the composite as depicting James Hall; (2) on viewing the photo lineup containing Mr. Hall's photograph, Stacy Dillon could not identify the "perpetrator"; and (3) on the viewing the photo lineup, James Bailey stated that Mr. Hall's photograph resembled the white male perpetrator, but that he was not positive, stating that the hair and facial hair length in the photograph was different from that of the perpetrator. (Dal to 5).

On November 3, 1978, Judge Merritt Lane, Jr., of the New Jersey Superior Court, granted the State's motion based exclusively on the affidavit of Detective

Booket. (2T).

On January 23, 1979, at the court-ordered lineup, Bailey and Dillon identified Mr. Hall.

The police then swore out a criminal complaint against Mr. Hall. Mr. Hall was charged with a five count indictment: Count I, Entering without breaking; Count II, Robbery of goods valued at excess of $500.00; Count III, Armed Robbery; Count IV, Assault with a dangerous weapon; and Count V, Possession of a dangerous weapon.

On November 5, 1979, Mr. Hall was found guilty by a jury on Counts I, II, III and V and found not guilty on Count IV.

On November 14, 1979, the defense moved for a new trial. In support of the motion, the defense argued, inter alia, that Mr. Hall was deprived of his consti-

tutional rights in being forced by order of the New Jersey Superior Court to appear in a pre-arrest lineup. (Da20 to 21).

On January 28, 1980, the trial judge denied the motion for a new trial. (Da42). Mr. Hall was sentenced to State Prison for a term of three to four years on Count I, five to six years on Count II, one to two years on Count III, all sentences to run concurrently. Count V was merged for sentencing purposes with Count III.

A Notice of Appeal to the Appellate Division of the Superior Court of New Jersey was filed by the defense on January 3, 1980. Mr. Hall's brief charged, inter alia, that the pre-indictment lineup violated constitutional rights and cited State v. Schweitzer, 171 N.J. Super. 82 (Law Div. 1979), in support of that con-

tention.

State v. Schweitzer, supra, a case decided shortly after Mr. Hall's trial, held that the subject matter jurisdiction of the Superior Court in criminal cases is first established on the filing of complaint on probable cause or indictment. Finding that there exists no grant of pre-arrest jurisdiction, the court concluded that there was neither jurisdiction over subject matter or the person to issue a pre-arrest detention order. Thus, to seek a suspect to appear in a lineup constituted a "deprivation of liberty offensive to due process". 171 N.J. Super. 89-90.

On March 1, 1982, the Appellate Division of the New Jersey Superior Court affirmed the conviction and specifically overruled Schweitzer. State v. Hall, 183

N.J. Super 221 (App. Div. 1981). In that opinion, the court stated, "We are satisfied the judicial branch has jurisdiction in criminal matters extending beyond the limits of Schweitzer" and based its finding of jurisdiction on the New Jersey Constitution (1947), Article VI, Section 3, paragraphs 2 and 3. 183 N.J. Super 229-230. Noting that Fourth Amendment considerations "come into play", the court relied on Davis v. Mississippi, 394 U.S. 721 (1969), to find that such a detention for lineup purposes "may constitute a much lesser intrusion upon personal security than other types of police searches and detentions." 394 U.S. at 727.

The defense filed a Petition of Certification to the Supreme Court of New Jersey, complaining that, inter alia, the Appellate Division erred in extending jur-

isdiction to issue detention warrants of less than probable cause, that its standards specifically violated the Fourth Amendment, and that the procedure employed did not comport with due process. Petition for Certification was granted on May 4, 1982, 91 N.J. 195 (1982).

On July 14, 1983, the New Jersey Supreme Court affirmed the decision of the New Jersey Superior Court, Appellate Division. 93 N.J. 522 (1983). The New Jersey Supreme Court held that "the Superior Court has jurisdiction to issue a warrant compelling a suspect to appear in a lineup prior to the filing of criminal charges upon a showing of less than probable cause provided that certain evidential standards and protective measures are satisfied". The court concluded that pre-arrest jurisdiction is founded on the con-

stitutional powers of the judiciary over searches and seizures rather than, as the Appellate Division had found, on the inherent powers bestowed on the courts by the state constitution. The court referenced this jurisdictional basis to the Fourth Amendment of the United States Constitution, and Article I, Paragraph 7 of the New Jersey Constitution (1947), which is practically identical. Concluding that an evidential finding of probable cause is not prerequisite to a detention warrant, and that such a warrant, as part of a class of identification procedures comparable to fingerprinting, is sustainable on less than probable cause, the court proceeded to outline evidential standards and procedural criteria. Based solely on the standards set forth in its opinion, the matter was then referred to

Criminal Practice Committee of the New Jersey Supreme Court, a rule making committee, for the purposes of general study, and for recommendation of appropriate rules and guidelines to govern these detentions.

REASONS FOR GRANTING THE PETITION

1. In holding that the court has jurisdiction to issue a criminal detention warrant to compel an individual to appear in a lineup when the standard of probable cause has not been met, the New Jersey court has brought judicial involvement to an area historically delegated to the executive branch of government. Traditionally, it has been the function of the police to investigate criminal matters and the courts to determine whether the investigation has matured to the point

where an arrest or search is appropriate. Judicial intervention would commence where there were allegations to support probable cause to search or arrest. By virtue of an expanded pre-probable cause jurisdiction, the court is lending its authority to the early stages of an investigation, and thus functioning as investigatory police. The danger thus arises that the judiciary would lose its detachment and its capacity to act as an impartial forum for the protection of constitutional rights. See Schweitzer, supra, at 90, and Wise v. Murphy, 275 A.2d 205 (D.C. App. 1971) at 221.

The New Jersey court makes no requirement that a prior hearing be held.[2/]

2/ Although the Davis Court notes that there should be judicial authorization prior to a prearrest detention for fingerprinting, the scope

The detention warrant may be procured on an ex parte application and based entirely on the hearsay affidavit of a police officer. As no prior hearing is afforded although judicial authorization is involved, the practical effect of the detention is simultaneously to broaden police power and to minimize the significance of judicial review as affording protection to citizens' basic consitutional rights.

The New Jersey court rationalizes its jurisdiction by analogizing a detention warrant to a search warrant, reasoning that, as with a search warrant, its jurisdiction over a pre-arrest lineup is conferred by the Fourth Amendment to the United States Constitution and its

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of the judicial review is never expounded. (394 U.S. at 727).

New Jersey equivalent. Paradoxically, the New Jersey court fails to complete the analogy it suggests, creating a detention procedure and according itself jurisdiction on less than probable cause. The court explains that this pre-probable cause jurisdiction would permit a "salutary review of police action" while affording constitutional protections to individuals. However, the review can hardly be deemed salutary as it deprives a citizen of his liberty on less than probable cause, without a hearing, without an indictment or accusation, without the right to bail or counsel, and without Miranda rights. Rather than adding constitutional protections, the pre-arrest jurisdiction eviscerates the Fourth Amendment, expanding the police power and rendering the Warrant Clause completely

meaningless.

2. The New Jersey court reasons that a finding of probable cause is not prerequisite to a pre-arrest lineup detention by virtue of Davis v. Mississippi, supra. The Davis Court observed that "...because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." 394 U.S. at 727. However, the Davis Court distinguished a lineup detention from a detention for fingerprinting. The Court noted the scientific value of fingerprinting, a process "inherently more reliable and effective than eyewitness identifications." which, unlike a lineup, is employed outside of a criminal investigation

as well, and may not be employed repeatedly or for the purposes of harrassment. 394 U.S. at 726-727.

The New Jersey court refers to United States v. Wade, 388 U.S. 218 (1967), to support the value of a lineup as a protection against abuses and unfairness. Wade, however, addressed the right to counsel at a lineup held after an arrest based on probable cause, unlike Hall, which deals with a pre-arrest, pre-indictment and pre-bail detention. The court below also fails to appreciate the abhorrence for lineups expressed in Wade:

> "...(t)he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.
>
> .... Moreover, '(i)t is a matter of common experience that,

> once a witness has picked out the accused at a lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." 388 U.S. at 228-229.

In formulating its decision, New Jersey court distorted the holdings of Terry v. Ohio, 392 U.S. 1 (1968), and its progeny. Terry held that where a police officer observes unusual conduct which leads him to reasonably conclude that criminal activity may be afoot, and that the persons may be armed and presently dangerous, and where on making inquiry, nothing serves to dispel his reasonable fear for his own or others' safety, he may conduct a limited pat down search for weapons. The Terry Court expressly declined to address "the constitutional pro-

priety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." 392 U.S. at 19, n.16. However, in Dunaway v. New York, 442 U.S. 220 (1979), the Court emphatically rejected any standard short of probable cause for an involuntary custodial interrogation. 442 U.S. at 216.

In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), border stops on the basis of "reasonable suspicion" were permitted because of the special interest of the federal government in immigration control. By contrast, the governmental interest in the case at bar is the generalized police interest of the State, while the intrusion is an extended seizure rather than a mere stop.

In Michigan v. Summers, 452 U.S. 692 (1981), the Court authorized a limited

detention of occupants while a search of the premises was conducted pursuant to a valid search warrant issued on the basis of traditional probable cause. The Court reasoned that where evidence is sufficient to establish probable cause to search, it is constitutionally reasonable to require that individuals remain while officers execute the search. 452 U.S. at 704-705. The case at bar is distinguished from Summers by the lack of probable cause. Furthermore, the stated purposes of the Summers detention were to prevent flight, minimize harm, and facilitate the orderly completion of the search. 452 U.S. at 702-703. Those interests are not present in Hall. In fact, a pre arrest detention warrant may serve to encourage flight. If an individual served with an order to appear in a lineup should flee, he cannot be

extradited from another jurisdiction because probable cause is absent.

The holding below is inconsistent with United States v. Place, 52 U.S.L.W. 4844 (U.S. June 21, 1983). In Place, the Court held that an extended (ninety minute) detention of luggage to a narcotics detecting dog was unreasonable. The Court stated that the limitations applicable to Terry precluded the detention. 52 U.S.L.W. at 2847. As the intrusion in Hall is far greater, involving the detention and extended seizure of a citizen, the rationale of Place would likewise preclude it.

3. The "evidential standards" offered by the New Jersey court fail to satisfy Fourth Amendment requirements. The first standard, that the police must show "that the crime has occurred, is unsolved, and is under investigation" mere-

restates that the lineup is being conducted as part of the investigation of a crime. This standard falls short of the special reasons which were required to substantiate even the mre stops of United States v. Brignoni-Ponce, supra, (governmental interest in border searches) and Terry v. Ohio, supra, (reasonable suspicion that criminal activity is afoot).

Secondly, that the police must demonstrate a "reasonable and well-grounded basis to believe that the individual sought may have committed the crime" is invalid on Fourth Amendment grounds and unconstitutionally vague on Fourteenth Amendment due process grounds. In Illinois v. Lance Gates, 51 U.S.L.W. 4709 (U.S. June 8, 1983), the Court notes: "... it is clear that only the probability, and not a prima facie showing of

criminal activity is the standard of probable cause." 51 U.S.L.W. at 4715, quoting Spinelli v. United States, 393 U.S. 410 (1969) at 419. However, the standard that the New Jersey Court suggests, as applied, deals not with probabilities, but with mere speculation. The warrant in the case at bar was issued although neither subject identified Mr. Hall's photograph. The suggested standard obviously permits the police to detain numbers of citizens while allegedly seeking a single perpetrator. As rights to a hearing, Miranda warnings, and bail are denied, this procedure effectively strips a citizen of his own constitutional rights on the barest of allegations.

The third evidential standard posited by the New Jersey court requires a showing that the "results of the detention

will significantly advance the investigation and serve to determine whether or not the suspect probably committed the crime." However, because of the suggestibility of a lineup, as well as the risk of mistaken identification, the results may improperly advance the investigation. In Davis and Wade, the Court warns that a lineup is an unreliable, unscientific procedure. Repeated viewing of an individual or his photograph may suggest his identity. See People v. Brown, 459 N.Y.S.2d 227 (Co. Ct. 1983). As the officer conducting the lineup is generally convinced that the individual is in fact the perpetrator, there is added suggestion.[3/] Therefore, to com-

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3/ The suggestibility of the procedure can be no better demonstrated than by the case at bar. Mr. Hall's face was the only one common to both lineups. The bias of the police is clear from their failure to pursue the stronger lead, from the false information in Detective Booket's affidavit, and from the suspicious mention of the "Hall holdup" in an early police report.

pel an individual to appear in a lineup based on mere speculation, with no prior hearing or Miranda warnings, defies the Fourth, Fifth, and Fourteenth Amendments.

The fourth evidential standard suggested by the court below is "that the results cannot otherwise practicably be obtained." The New Jersey court thus requires a showing that, as to the individual involved, the investigation would, as a practical matter, be terminated unless the procedure were employed. The court below noted that the procedure employed at the matter at bar comported with its standards, i.e., the investigation, as to Mr. Hall, would have terminated had this procedure not been employed. It therefore follows that unless the procedure is justified, the conviction would not stand. This is also implicit from the

fact that Certification to the New Jersey Supreme Court was granted on the issue of the validity of the pre arrest lineup procedure alone. Therefore, if the procedure is unjustifiable, nothing can purge the initial taint. As the fruits of improper procedures are excluded because of constitutional improprieties, this practically per se procedure, involving constitutional improprieties, cannot be justified, and its fruits are necessarily tainted.

CONCLUSION

In its opinion below, the Supreme Court of New Jersey introduces a practically per se procedure whereby a citizen can be compelled to submit to a lineup prior to arrest, indictment, accusation, or the filing of a criminal complaint against him. The procedure is sustainable on "less than probable cause," which, as applied, requires little more than the barest speculation. The citizen is afforded no Miranda warnings, and no rights to bail. Prior to the detention, the citizen is afforded no hearing in which he may confront or crossexamine his accusor, so that, as a practical matter, there is no way of determining whether any evidential standard has been met. Clearly, the procedure does not meet constitutional requirements, and a conviction based thereon cannot stand.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STUART SURICK, ESQUIRE
Attorney for Petitioner
3735 Lawrenceville Road
Princeton, New Jersey

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-48 September Term 1982

STATE OF NEW JERSEY :

Plaintiff-Respondent, :

v.

JAMES H. HALL, JR. :

Defendant-Appellant. :

Argued Decmeber 7, 1982 -- Decided July 14, 1983.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 183 N.J. Super. 224 (1982).

Stuart Surick argued the cause for appellant.

Debra L. Stone, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by HANDLER, J.

The issue presented by this appeal is whether the Superior Court had jurisdiction and adequate grounds to compel the defendant to submit to a lineup prior to his arrest or the filing of any charges against him. We now hold that the Superior Court has jurisdiction to issue process compelling a suspect to submit to a lineup prior to the filing of criminal charges upon a showing of less than probable cause, provided certain evidential standards and protective procedures are satisfied.

I

In the early morning hours of February 3, 1978 an armed robbery took place

at the home of James Bailey, in Cliffwood Beach, New Jersey. Bailey and his girlfriend, Stacey Dillon, had just arrived at the home when two male intruders appeared, one white and the other black. The white male demanded that Bailey produce ten pounds of marijuana that he believed was in the house. Bailey explained that he did not have the marijuana, but that Michael Huff, from whom he had purchased nine ounces of marijuana, had the contraband.

After Bailey turned over the nine ounces of marijuana that he did possess, the intruders began an extensive search of the home. They cut wires from several stereo components, ripped a television from its casings and tore a telephone from the wall. At this time one of the intruders also took Bailey's wallet. The black man

then took Dillon into a front room and tied her hands. Later she was taken into the bedroom and tied to Bailey. As the intruders were leaving, one of the men told Bailey that they would return Bailey's television and stereo when they received money owed to them by Michael Huff.

Dillon and Bailey freed themselves and telephone the latter's roommate, Louis Campanelli. They did not immediately call the police because the incident involved drugs. After learning of the robbery, Campanelli, Huff and two other friends arrived at the house. The police were then called. When the police arrived, the two victims gave complete descriptions of the intruders.

Subsequent police investigation of the episode revealed that the defendant, James H. Hall, Jr., might have been one of

the intruders. A week after the robbery Detective Joseph Booket of the Aberdeen Township Police Department called the victims and requested that they come to police headquarters to assist in the preparation of a composite sketch of the two perpetrators. Dillon, who had been able to observe the white intruder from a distance of five feet during the robbery, was unable to identify defendant from a series of photographs of potential suspects. Bailey made an equivocal identification of defendant's photo, noting that he could not be absolutely sure because the man's hair in the photo was a "lot shorter" than it was on the night in question. Based upon this tentative identification, the Monmouth County prosecutor moved for an order compelling defendant to appear in a lineup. Over de-

fendant's objections and following a hearing, the trial court granted the motion and scheduled a lineup.[1]

After viewing the court-ordered lineup, Dillon twice identified defendant as one of the men who robbed her. Bailey also viewed the lineup and positively identified defendant. Immediately after the lineup the police swore out a criminal complaint against Hall. Defendant was charged in a five-count indictment with entering with intent to steal, robbery of goods valued in excess of $500, armed robbery, assault with an

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[1] Prior to the lineup, a man entered Bailey's place of employment looking for Bailey. A co-worker advised Bailey that the man had asked for him on a previous occasion. Bailey followed the man outside and saw him walk to a car in which defendant was sitting. Defendant excited the car and exclaimed "Jimmy (Bailey), I never saw you before in my life. I didn't do it. Do you know how many guys look like me...?" Bailey responded by shaking his head.

offensive weapon, and possession of a dangerous weapon.

Defendant was found guilty by a jury on all counts with the exception of assault with a deadly weapon. Thereafter defendant moved unsuccessfully for a new trial, arguing that the court-ordered lineup was improper and that the jury verdict was tainted. The Appellate Division affirmed the convictions. 183 N.J. Super. 224 (1982). The Court granted the petition for certification limited to the issue of the validity of the order compelling the lineup. 91 N.J. 195 (1982).

II

Defendant challenges the jurisdiction of the trial court to issue an order compelling an unarrested and uncharged suspect to appear for a lineup.

He relies upon State v. Schweitzer, 171 N.J. Super. 82 (Law Div. 1979), which held that the Superior Court lacked jurisdiction to subject an individual to a pre-charge or pre-arrest detention. In its decision below the Appellate Division expressly overruled Schweitzer, finding untenable its "parochial view that both subject matter and personal jurisdiction in the judicial branch are marked at their extremities by the indictment and the imposition of sentence." 183 N.J. Super. at 228. The Appellate Division ruled that under N.J. Const. (1947), Art. VI, § III, pars. 2 and 3[2] the Superior Court possessed jurisdiction over criminal matters

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[2] Art. VI, § III, par. 2 provides: "The Superior Court shall have original general jurisdiction throughout the State in all causes."

Art. VI, § III, par. 3 provides in perti-

including ordering ordering a suspect to appear for a lineup. Id. at 229.

We concur with the Appellate Division's conclusion that the State and federal constitutions authorize the judiciary to order a lineup in these circumstances. We determine, however, that the jurisdiction of a court to issue process authorizing a pre-charge or pre-arrest detention in conjunction with a criminal investigation is founded on the judiciary's constitutional powers over searches and seizures. N.J. Const. (1947), Art. I, par. 7 and U.S. Const., Amend. IV.[3]

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[2] (cont'd)

nent part: "Each division (of the Superior Court) shall . . . hear such causes, as may be provided by rules of the Supreme Court."

[3] The language of these State and federal constitutional provisions is nearly identical. N.J. Const. (1947), Art. I, par. 7 provides:

We believe that an application to detain a suspect for the purpose of conducting a lineup must be considered as "the functional equivalent of an application for( ) issuance . . . of a search warrant." In re Fingerprinting of M.B., 125 N.J. Super. 115, 122 (App. Div. 1973) (application for an order compelling fin-

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[3] (cont'd)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or addirmation, and particularly describing the place to be searched and the papers and things to be seized.

U.S. Const., Amend. IV reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

gerprinting of an entire class of public school students during a criminal investigation); see also In re Morgenthau, 188 N.J. Super. 303 (App. Div. 1983); State v. Foy, 146 N.J. Super. 378 (Law Div. 1976), app. dism. 153 N.J. Super. 503 (App. Div. 1977); Matter of Abe A., 56 N.Y. 2d 288, 437 N.E. 2d 265, 452 N.Y.S. 2d 6 (N.Y. 1982) (judicial authority to compel investigatory detention rests on court's power to issue search warrants); People v. Marshall, 244 N.W. 2d 451 (Mich. Ct. App. 1976) (same); cf., Wise v. Murphy, 275 A. 2d 205 (D.C. 1971) (court's power to issue investigatory process rests on statutory authority); State v. Grijalva, 533 P. 2d 533 (Ariz. 1975), cert. den. sub nom. Grijalva v. Arizona, 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed. 2d 104 (1975) (court's jurisdiction over pre-arrest detentions based

on statutory authority). An individual who must submit to a lineup is detained by the police and visually examined by crime victims or witnesses. Because such a detention, like a search, invades an individual's privacy and, like any seizure or arrest, restrains personal liberty, the constitutional interests upon which investigatory detentions and conventional searches and seizures may intrude are similar. Davis v. Mississippi, 394 U.S. 721, 726-27, 89 S.Ct. 1394, 1397, 22 L.Ed. 2d 676, 680-81 (1969); see also Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 1879, 20 L.Ed. 2d 889, 904 (1968); United States v. Place, 51 U.S.L.W. 4844, 4847 (U.S. June 21, 1983). Further, the purpose of investigatory detentions is similar to that of conventional searches and seizures. They are undertaken to advance the

investigation of criminal cases. Additionally, judicial supervision of the criminal process in the investigatory stages of a prosecution, just as in the accusatory phases, permits a salutary review of police actions and protects the constitutional rights of citizens who are suspects in criminal investigations or otherwise embroiled in the criminal process. See generally United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); compare Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972). These considerations lead us to consider and treat such investigatory detentions as searches or seizures within the scope of the Fourth Amendment and the State Constitution. Regarded as a search or seizure, investidetentions are properly within the juris-

diction of the judiciary to ensure they are reasonable.

In sum, we hold that the Superior Court has jurisdiction to authorize investigative detentions. This power to authorize investigative detentions is properly founded upon the judiciary's constitutional authority governing search and seizures, N.J. Const. (1947), Art. I, par. 7 and U.S. Const., Amend. IV.[4]

4

Although this constitutional basis for jurisdiction is different from the constitutional basis relied upon by the Appellate Division below, it does not conflict with the Appellate Division determination. The Appellate Division relied on N.J. Const. (1947) Art. VI § III, pars. 2 and 3. This analysis recognizes that once jurisdiction is established to authorize a pre-arrest or pre-charge lineup, such jurisdiction rests with the Superior court. Both views are consistent with other decisions that recognize that a court's jurisdiction over the administration of criminal justice is pervasive. E.g., State v. Williams, 93 N.J. 39 (1983); State v. Leonardis, 73 N.J. 360 (1977); State v. Leonardis, 71 N.J. 85 (1976); see State v. Goodman, 92 N.J. 43 (1983); State v. Robinson, 148 N.J. Super. 278 (App. Div. 1977).

When this jurisdiction is invoked, it triggers the judicial responsibility to assess the need advanced by law enforcement for such procedures and to protect the rights of individuals to be free from unreasonable searches and seizures.

III

We next consider whether the constitutional rights of individuals against unreasonable searches and seizures are adequately protected by investigatory detentions that are judicailly authorized upon less than probable cause and whether certain procedures must be followed in conducting such detentions. In its opinion below, the Appellate Division observed that a court-compelled lineup constituted a less severe intrusion upon privacy interests than a conventional search

or seizure and that such a personal lineup could be authorized where "'the State has established a well-founded suspicion of sufficient weight to justify compelling (a criminal suspect) to submit to an in-person line-up.'" State v. Hall, supra, 183 N.J. Super. at 231 (quoting from trial court decision granting state's motion to compel lineup). Other decisions in this jurisdiction have similarly approved comparable investigatory detentions on less than probable cause. See In re Fingerprinting of M.B., supra (fingerprinting); see also State v. Bradshaw, 170 N.J. Super. 527 (App. Div.), certif. den., 82 N.J. 276 (1979) (lineup); State v. Foy, supra (lineup).

Our consideration of the requisite standards to be applied in this area focuses on the Supreme Court's decision

in Davis v. Mississippi, supra. There the Supreme Court considered whether fingerprints taken from a defendant in the course of an investigatory detention conducted on less than probable cause were admissible in eviden-e. It observed that ". . . because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." 394 U.S. at 727, 89 S.Ct. at 1397098, 22 L.Ed. 2d at 681 (citation omitted). The Court went on to describe the salient features of an investigatory detention for the purpose of fingerprinting.

> Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fin-

> gerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.
>
> (Id. at 727-28, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681)[5]

---

5 The Supreme Court in Davis did not actually decide whether "procedures for obtaining, during the course of a criminal investiga-

Our reading of Davis convinces us that for certain detentions -- those that do not entail significant intrusions upon individual privacy or freedom, are productive of reliable evidence, and can be effectuated without abuse, coercion or intimidation -- "no probable cause in the traditional sense" is necessary in order to obtain the "authorization of a judicial officer(.)" We conclude that, under a "narrowly defined" set of circumstances, such detentions can be constitutionally permissible. Davis, 39 U.S. at 727-28, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. Strictly limiting the circumstances under which such detentions take place insures that the restrictions upon in-

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5 (cont'd)
tion, fingerprints of individuals for whom there is no probable cause to arrest" could pass muster under the Fourth Amendment.

dividual privacy and freedom interests are minimized so that a showing of need upon less than traditional probable cause can be tolerated. See United States v. Place, supra, 51 U.S.L.W. at 4846 (minimally intrusive detention can be supported on less than probable cause); Terry v. Ohio, supra, 392 U.S. at 27, 88 S.Ct. at 1883, 29 L.Ed. 2d at 909 (permitting police to conduct "stop and frisk" upon less than probable cause); Michigan v. Long, 51 U.S.L.W. 5231 (U.S. July 6, 1983) (permitting police to conduct protective search for weapons in passenger compartment of car upon less than probable cause); cf. Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967) (permitting search upon probable cause determined by administrative standards).

We accordingly conclude that an evidential finding of probable cause to believe that a particular individual has committed a crime is not an absolute prerequisite for judicial authorization of an investigatory detention. We are satisfied that a court has jurisdiction to authorize an investigatory detention under the following limited circumstances. The court's authorization of an investigatory detention must, first, be based upon sufficient evidence to demonstrate that a particular crime has occurred, that the crime is unsolved and that it is under active investigation. Second, the police must demonstrate a reasonable and well-grounded basis to believe that the individual sought as the subject of the investigative detention may have committed the crime under investigation. Addition-

ally, it must be shown that the results of the detention will significantly advance the criminal investigation and will serve to determine whether or not the suspect probably committed the crime. Further, it must also appear that these investigative results cannot otherwise practicably be obtained.[6]

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[6] These standards, in some ways, parallel those adopted in the American Law Institute's Model Code of Pre-Arraignment Procedure Art. 170, Order to Appear for Identification Procedures (1975). With respect to "identification procedures," Section 170.2(6) provides:

> Basis for Issuance.
> The authorized official shall issue a nontestimonial identification order only if he finds that the application meets the requirements of this Section and that, on the basis of the proceedings before him;
>
> > (a) there is reasonable cause to believe an offense specifically described in the application has been committed;
> >
> > (b) there are reasonable grounds to suspect that the person named or de-

In addition to these evidential standards that serve to limit the circumstances under which investigatory detentions may be judicially authorized without probable cause, we recognize that appropriate procedures must be fashioned to assure that the intrusiveness of the detention is properly circumscribed. Investigatory detentions can involve dif-

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6 (cont'd)

> scribed in the affidavit may have committed the offense and it is reasonable in view of the seriousness of the offense to subject him to the specific identification procedures set forth in the application.
>
> (c) the results of the specific identification procedures will be of material aid in determination whether the person named in the affidavit committed the offense; and,
>
> (d) such evidence cannot practicably be obtained by the investigating officer from law enforcement agency or other public official or agency.

ferent kinds of evidence-gathering procedures with differing degrees of intrusiveness. The Supreme Court in Davis emphasized that a detention to permit fingerprinting constituted a limited intrusion into a person's liberty and privacy because fingerprinting did not "prob(e) into an individual's private life and thoughts." A detention for fingerprinting was also regarded as essentially a reliable, simple and expeditious proceeding that could be conducted fairly and without palpable abuse. Davis, supra, 394 U.S. at 727, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. Accordingly, we conclude that those identification procedures that are comparable to fingerprinting will be sustainable upon a showing of less than traditional probable cause.[7]

---

[7] We believe that certain types of proce-

In this case, we think that a lineup for the purpose of securing an identification of the criminal suspect can be conducted in conformity with such standards and likened to the fingerprint-

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7 (cont'd)
dures constitute intrusions that are significantly different from the fingerprinting process, see United States v. Dionisio, 410 U.S. 1, 14-15, 93 S.Ct. 764, 771-72, 35 L.Ed. 2d 67, 79-80 (1973) (distinguishing blood samples from voice or handwriting exemplars and fingerprinting), and would not satisfy the rationale in Davis. The range of such procedures that can be conducted during an investigatory detention is offered by ALI, Model Code of Pre-Arraignment Procedures § 170.12(2), which provides:

> Definition of "Identification Procedures." As used in this Article "identification procedures" shall mean
>
> (a) procedures to obtain identification by fingerprints, palm prints, footprints, body measurements, dental impressions, or other reasonable body surface examinations;
>
> (b) procedures to obtain specimens or samples of blood, urine, saliva, hair or fingernails, or other bodily substances that can be obtained

ing process. The lineup involves no creative or unusual act on the part of the suspect; it involves only a display of evidence that is otherwise publicly visible. See Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed. 2d 576, 582 (1967). In this regard the lineup does not "prob(e) into an individual's private life and thoughts." Davis, supra, 394 U.S. at 727, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. Furthermore, the lineup, when properly conducted, can protect against abuse and insure fairness.

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7 (cont'd)
by comparable methods;

(c) procedures to obtain identification material that may be on the surface of the body or under fingernails or that can be obtained by comparable methods; and

(d) procedures to obtain witness identification through lineups, photographs, voice samples or handwriting exemplars.

See United States v. Wade, supra. When conducted properly and fairly the procedure can furnish reliable evidence and can often be an effective crime-solving tool. Id.; see also State in the Interest of W.C., 85 N.J. 218 (1981). Finally, the lineup procedure can be accomplished at a convenient time and need not entail a restrainst upon the suspect for an unduly long period of time.

In order to safeguard constitutional interests and secure the overall reasonableness of such nontestimonial identification procedures, the conduct of investigatory detentions must be carefully circumscribed by other procedural protections. Davis v. Mississippi, supra, 394 U.S. at 728, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. (implying that require-

ments of the Fourth Amendment could be met by narrowly circumscribed procedures); see also State v. Valencia, 93 N.J. 126 (1983) (in addition to evidential showing, telephone authorized search must meet certain minimum procedural safeguards). Indeed, the Supreme Court in Davis observed that "abuses" can occur in an investigatory detention, mentioning specifically an "improper line-up." Davis v. Mississippi, supra, 394 U.S. at 727, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. As a result, in order to guarantee that the detention and accompanying intrusion is not improper or abusive, it must be accomplished in a fashion designed to produce the least amount of harassment of, interference with, or prejudice to the suspect. See, e.g., N.C. Gen. Stat. § 15A-279 (1978); ALI, Model Code of Pre-Arraign-

ment Procedure §§ 160.2, 170.7 (1975); Proposed F. R. Crim. P. 41.1(i) (1971). Further, inmost cases, the suspect must be given sufficient notice of the proposed detention.[8]

8

We acknowledge that certain exigent circumstances will demand prompt police action. For example, police investigators may be required to act swiftly if they reasonably believe that a suspect will radically alter his appearance or flee. In such cases, effective law enforcement will be thwarted by requiring judicial authorization for a detention order, granting the suspect the opportunity to contest a motion for a judicially authorized order and providing notice to the suspect and an opportunity to arrange a convenient time for the detention. Therefore, in such circumstances, prior judicial authorization need not be an absolute requirement. We caution, however, that upon any subsequent motion by the suspect to suppress the results of such a detention, the State bears the heavy burden of proving that the exigent circumstances duly justified dispensing with the required procedures and that the detention satisfied the federal and State constitutional guarantees against unreasonable searches and seizures. See, e.g., United States v. Place, 51 U.S.L.W. 4844 (U.S. June 21, 1983).

See, e.g., N.C. Gen. Stat. § 15A-274. The suspect should also be given the opportunity to arrange a convenient time for the detention, In re Fingerprinting of M.B., supra; see, e.g., N.C. Gen. Stat. §§ 15A-275; ALI, Model Code of Pre-Arraignment § 170.4; Proposed F. R. Crim. P. 41.1(e), and the opportunity to have counsel present during the detention. See, e.g., N.C. Gen. Stat. § 15A-279(d); Idaho Code § 19-625(2)(H) (1979). In addition, unusual or untoward consequences to the suspect resulting from the detention should be avoided or minimized.[9]

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[9] For example, all investigative results could, if appropriate, be destroyed on request of the suspect if, within a reasonable amount of time, there remains no probable cause to link him to the offense being investigated. See, e.g., N.C. Gen. State. § 15A-280; ALI, Model Code of Pre-Arraignment Procedure § 170.8(4); Proposed F. R. Crim. P. 41.1(j).

We think that these procedural safeguards protect citizens' constitutional rights. We are also satisfied that the evidential standard that we adopt, ante at , (slip op. at 13-14), allows police to investigate serious offenses without unduly interfering with the liberty or privacy of a person who has not been charged with any crime. In our view, these procedural requirements, in conjunction with the evidential standard, represent a proper balancing of the public interest in effective law enforcement and the liberty and privacy interests of the individual under the federal and State constitutions.

IV

Applying these judicially formulated guidelines to this case, we believe

that the circumstance- surrounding defendant's detention and lineup clearly and adequately satisfied his constitutional right to be free from unreasonable searches and seizures. Defendant was linked to the commission of serious offenses for which he was ultimately convicted. According to the affidavit in support of the motion to compel the lineup, defendant was identified by an informant as the robber depicted in the composite sketch that was prepared by the police with the assistance of the victims of the crime. Also, one eyewitness of the crime had already made an equivocal identification of defendant's photograph. Based on this substantial information, the prosecutor moved for a detention order. Defendant, accompanied by counsel, was permitted to contest the motion. The

trial judge found that Detective Booket's affidavit established an articulable, well-founded belief that defendant was involved in the commission of the particular offenses. Thus, upon notice to the defendant and with provisions for him to be heard, the detention order was authorized by a neutral and detached judge.

Further, in this case, the degree of intrusion into the individual's interests was certainly reasonable when measured against the degree of proof presented and the government interest involved. The detention was brief. It was conducted upon ample notice and at a convenient time. Defendant was not required to perform any creative act or give evidence not otherwise readily visible. Significantly, no interrogation occurred. Unquestionably, defendant's line-

up detention, safeguarded by adequate restrictions, was beyond legal reproach.

V

The subject of investigative detention is one that merits comprehensive consideration. This subject matter, like telephonically authorized searches, which we recently considered, see State v. Valencia, supra, is more appropriately treated through the exercise of the Court's rule-making power or by legislative action. The subject of investigative detentions has received considerable attention from commentators and in several other jurisdictions that have enacted thorough and detailed schemes regulating pre-charge and pre-arrest investigative detention.[10] The myriad of factors that

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[10] For legislative treatment, see, for

can affect the constitutionality of an investigative detention, including the evidential standards that may justify a detention, the degrees and types of intru-

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10 (cont'd)
example, Ariz. Rev. Stat. § 13-3905 (1978); Idaho Code § 19-625 (1979); N.C. Gen. Stat. § 15A-271 et seq. (1978 & Supp. 1982); Del. Stat. Ann. tit. XI, § 1901 et seq. (1979). S. 2997, proposing 18 U.S.C. § 3507, was introduced in the Senate in 1969, see 115 Cong. Rec. 28896, but remains unadopted as does Proposed Rule 41.1 of the Federal Rules of Criminal Procedure, see 52, F.R.D. 409, 462-67 (1971). See also American Law Institute, Model Code For Pre-Arraignment Procedures, Art. 170 (1975). Numerous commentators have made observations on the topic. See, for example, Note, "Temporary Detention For Lineup Identification With Less Than Probable Cause Permissible Under The Fourth Amendment," 18 Wayne L. Rev. 827 (1972); Comment, "Detention for Taking Physical Evidence Without Probable Cause," 14 Ariz. L. Rev. 132 (1972); Note, "Detention To Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 Of The Federal Rules of Criminal Procedure," 72 Colum. L. Rev. 712 (1972); Comment, "Nontestimonial Identification Orders Without Probable Cause," 12 Wake Forest L. Rev. 387 (1976); Steele, "A Proposal To Legitimate Arrest For Investigation," 27 Sw. L.J. 415 (1973).

sions, and the procedures that must accompany a detention, persuade us to refer this matter to a rule-making committee for careful study. The public interest in effective law enforcement and in the containment of criminal activity argues in favor of such investigative detentions provided that safeguards are fashioned to protect basic constitutional rights. We therefore direct the Criminal Practice Committee of the Supreme Court to consider the subject of investigative detentions. The practices of other jurisdictions and literature on the topic provide a starting point for the consideration and formulation of appropriate rules and guidelines governing such detentions.

VI

In conclusion, we hold that there is jurisdictional authority that empowers the Superior Court to issue process to compel a suspect to submit to an investigative detention. This power derives from the court's constitutional power to protect citizens from unreasonable searches and seizures. Orders authorizing an investigative detention may be issued upon less than probable cause according to the evidential standards that we have imposed. Further, the types of nontestimonial identification procedures conducted pursuant to such detentions will be limited and must conform to the procedures that we have specified. These standards and procedures are designed to meet the requirements of the Fourth Amendment and the com-

parable State constitutional provision by minimizing the intrusions upon individual privacy and liberty interests occasioned by such investigative detentions.

Although the complexity of the subject matter prompts us to direct the Criminal Practice Committee of the Supreme Court to study the issue of investigative detentions and recommend rules to be implemented in this jurisdiction, the standards and procedures utilized in the instant case fully comported with the federal and New Jersey constitutions and conformed to the guidelines prescribed herein. Accordingly the judgment of the Appellate Division is affirmed.

Chief Justice Wilentz and Justices Clifford, Schreiber, Pollock, O'Hern and Garibaldi join in this opinion.

No. 83-427

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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Respondent,

-*vs*-

JAMES H. HALL, JR.,

Petitioner.

On Petition for Writ of Certiorari
to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITON FOR A WRIT OF CERTIORARI

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625
(609) 292-8740

Attorney for Respondent

Of Counsel
Allan J. Nodes,
Deputy Attorney General
On the Brief
Debra L. Stone
Deputy Attorney General

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363
Cranbury, N.J. 08512
Area Code 609
443-4202

QUESTIONS PRESENTED

1. Whether the Superior Court of New Jersey, Law Division has jurisdiction under *N.J. Const. (1947), Art. 1, par. 7* and *N.J. Const. (1947) Art. VI, sec. III*, pars. 2 and 3 to issue an order compelling a suspect to appear in a line-up.

2. Whether, consistent with the Fourth Amendment of the United States Constitution and *N.J. Const. (1947), Art. 1*, par. 7, a Court may, in limited circumstance on the basis of evidence amounting to reasonable suspicion to believe a suspect has committed an armed robbery, order that a suspect be briefly detained for a nontestimonial identification procedure provided proper procedural safeguards are applied.

TABLE OF CONTENTS

PAGE

Questions Presented.....i
Table of Contents.....ii
Table of Citations.....iii
Opinions Below.....1
Jurisdiction.....1
Constitutional Provisions Involved.....2
Counter-Statement of Matter Involved.....4
Summary of Argument.....6
Reasons for Denying Certiorari.....7

POINT I THE JURISDICTION OF THE SUPERIOR COURT OF NEW JERSEY IS A QUESTION RESOLVED SOLELY ON THE BASIS OF THE NEW JERSEY STATE CONSTITUTION..... 7

POINT II THE SUPREME COURT OF NEW JERSEY PROPERLY AUTHORIZED STRICTLY LIMITED INVESTIGATIVE DETENTIONS BASED UPON LESS THAN PROBABLE CAUSE..... 9

Conclusion.....15

TABLE OF CITATIONS

PAGE

CASES CITED

Bell v. Wolfish, 441 U.S. 520 (1979).....10,13
Brinegar v. United States, 338 U.S. 160 (1949).....10
Brown v. Illinois, 422 U.S. 590 (1975).....12
Brown v. Texas, 443 U.S. 47 (1979).....13
Camara v. Municipal Court, 387 U.S. 523 (1967).....11,12
Coolidge v. New Hampshire, 407 U.S. 443 (1971).....8
Davis v. Mississippi, 394 U.S. 721 (1969).....12
Delaware v. Prouse, 440 U.S. 648 (1979).....13
Dunaway v. New York, 442 U.S. 220 (1979).....12,13
Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317 (1983).....5
Katz v. United States, 389 U.S. 347 (1967).....10
Kirby v. Illinois, 406 U.S. 682 (1972).....13
Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).....8
Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469 (1983).....7
Michigan v. Summers, 452 U.S. 692 (1981).....13
Miranda v. Arizona, 384 U.S. 436 (1966).....12
See v. Seattle, 387 U.S. 541 (1967).....11
State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981).....7
State v. Hall, 183 N.J. Super. 224, 443 A.2d 767 (App. Div. 1981) aff'd., 93 N.J. 552, 462 A.2d 115 (1983).....6,passim
State v. Hunt, 91 N.J. 3381, 450 A.2d 952 (1982).....7
State v. Valencia, 93 N.J. 126, 459 A.2d 1149 (1983).....7
Terry v. Ohio, 392 U.S. 1 (1968).....10,11,13
United States v. Martinez-Fuerte, 428 U.S. 543 (1976).....10,13
United States v. Place, ____ U.S. ____, 103 S.Ct. 2637 (1983).....10,13
United States v. Wade, 388 U.S. 218 (1967).....13

CITATIONS

PAGE

STATUTES CITED

N.J.S.A. 2A:90-3.....5
N.J.S.A. 2A:94-1.....5
N.J.S.A. 2A:141-1.....5
N.J.S.A. 2A:151-5.....5
N.J.S.A. 2A:151-41(c).....5

UNITED STATES CONSTITUTION CITED

Fourth Amendment.....2,passim
Fifth Amendment.....2,passim
Fourteenth Amendment.....2,passim

NEW JERSEY CONSTITUTION CITED

N.J. Const. (1947) Art. VI, sec. III, pars. 2 and 3.....7
N.J. Const. (1947), Art. I, par. 7.....7

OTHER SOURCES CITED

28 U.S.C. sec. 1257 (3).....1
Note, "Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure," 72 Cal.L.Rptr. 712 (1972).....14
LaFave, "'Street Encounters' and the Constitution: Terry, Sibron, Peters, and Beyond," 67 Mich.L.Rev. 40 (1968).....10
Comment, "Custodial Seizures and the Poison Tree Doctrine: Dunaway v. New York and Its Aftermath," 13 J. Marshall L. Rev. 733 (1980).....12

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the Supreme Court of New Jersey is reported at *93 N.J. 552, 461 A.2d 1155 (1983)*. The opinion of the Superior Court of New Jersey, Appellate Division is reported at *183 N.J.Super. 224, 443 A.2d 767 (App. Div. 1981)*.

JURISDICTION

Peitioner invokes this Court's jurisdiction pursuant to *28 U.S.C. sec. 1257(3)*.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Consititution (1791):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution (1791):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution (1868):

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 7 of the New Jersey Constitution (1947):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

Article VI, Section III, par. 2 (1947):

> The Superior Court shall have original general jurisdiction throughout the State in all cases.

Article VI, Section III, par. 3 (1947), in pertinent part:

> Each division [of the Superior Court] shall ... hear such causes, as may be provided by rules of the Supreme Court.

COUNTER-STATEMENT OF MATTER INVOLVED

This case arises out of the following circumstances: In the early morning hours of February 3, 1978 two men, one white (petitioner) and one black, broke into the home of James Bailey and demanded to know from Bailey and his girlfriend Stacey Dillon the whereabouts of ten pounds of marijuana. (3T107-11 to 108-11; 3T170-15 to 173-15).[1] Bailey and Dillon denied knowledge of the drugs and were subsequently robbed and the home ransacked. Bailey and Dillon, who had been tied up by the robbers, worked themselves free and eventually telephoned the police. The white male robber (petitioner) was described to the police (3T125-14 to 126-6; 3T257-2 to 11), as in his late twenties, approximately six feet in height, weighing about 200 to 230 pounds, with shoulder length, dirty blond hair and a long, full beard. (3T108-12 to 109-8; 3T117-15 to 119-11; 3T175-25; 3T179-12 to 180-2; 3T186-20 to 187-16). Detective Joseph Booket of the Aberdeen Township Police Department telephoned Dillon and Bailey and asked them to come to police headquarters to assist in the preparation of composite sketches of the two bandits. (3T129-1 to 130-1; 3T198-9 to 199-9; 3T263-5 to 12). Ultimately, an unnamed individual identified the man depicted in the composite sketch as petitioner. As a result, an eight year old mug shot of petitioner was obtained and included in a photographic array. Sometime later, Dillon and Bailey were each shown a series of photographs of bearded, potential suspects, which included the old photograph of petitioner. Dillon was unable to identify petitioner. (3T131-6 to 132-18). Bailey, however, made a tentative identification of petitioner's photograph, noting that Bailey could not be absolutely certain because petitioner's hair was "a lot shorter" in the photograph than on the night in question. He, however, asserted that the man depicted in the photograph looked like the white male robber. (3T201-15 to 25; 3T267-2 to 24).

All this information was submitted by the prosecutor in a sworn affidavit executed by Detective Joseph Booket of the Aberdeen Township Police Department, to the Honorable Merritt Lane, Jr., A.J.S.C. in support of a motion to compel petitioner to submit to

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1 T refers to the transcript of the appeal of Pretrial Intervention (PTI) rejection.
2T refers to the transcript of motion to compel petitioner's participation in a lineup.
3T refers to Volumes I and II of the trial transcript.
4T refers to the post-trial proceedings of January 11, 16, 18, 1980.
5T refers to the post-trial proceedings of January 25, 1980.
6T refers to the post-trial proceedings of January 28, 1980.

a line-up. (Da1 to 5).[2] As a result, a hearing was conducted on November 3, 1978, before Judge Lane to determine if petitioner, who was previously arrested in September 1978 on a charge of atrocious assault and battery (PSR5), would be compelled to appear in a lineup. Judge Lane ultimately ruled that Detective Booket's affidavit established an articulable, well-founded suspicion that defendant was involved in the instant offenses. (2T19-24 to 21-3). A lineup was subsequently held and petitioner was identified.

Petitioner James Hall, Jr., was charged in Monmouth County Indictment No. 909-78 with entering without breaking with intent to steal, in violation of *N.J.S.A. 2A:94-1* (Count One); robbery of goods valued in excess of $500, in violation of *N.J.S.A. 2A:141-1* (Count Two); armed robbery in violation of *N.J.S.A. 2A:151-5* (Count Three); assault with an offensive weapon (knife), in violation of *N.J.S.A. 2A:90-3* (Count Four), and possession of a dangerous weapon (knife), in violation of *N.J.S.A. 2A:151-41(c)*. (Da9 to 11).[3]

A jury trial was then conducted before the Honorable Cuddie E. Davidson, Jr., J.S.C., on October 30, 31, November 1, 2, 5, 1979 at the conclusion of which petitioner was acquitted of Count Four - the assault charge - and convicted of the remaining counts.

On November 14, 1979, petitioner moved for a new trial. Consequently, Judge Davidson conducted hearings on the matter on January 11, 16, 18 and 25, 1980. On February 6, 1980, Judge Davidson denied petitioner's motion for a new trial. An order to that effect was filed on February 7, 1980. (Da42).

On January 29, 1980, Judge Davidson sentenced petitioner to a State Prison term of three to four years on Count One (entering without breaking), five to six years for Count Two (robberty) and one to two years for Count Three (the armed feature), all sentences to run concurrently. Count Five (possession of a knife) was merged for sentencing purposes with Count Three.

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2 Petitioner rather disingeniously phrases his summary of the affidavit on page 8 of his petition to imply that the police officer stated that the person who identified the composite sketch was unreliable. This is not what the officer said. (See Da5). In any event, reliablity is not an issue. Here, one person recognized the sketch as depicting petitioner. Moreover, under the totality of the circumstances the reliability of that identification is manifest. *Illinois v. Gates*, ____ U.S. ____, *103 S.Ct. 2317 (1983)*.

3 Da refers to the appendix of petitioner's brief before the Superior Court of New Jersey, Appellate Division.

A Notice of Appeal to the Superior Court of New Jersey, Appellate Division was filed by petitioner on January 30, 1980. (Da48 to 49). On March 1, 1982, the Honorable John W. Fritz, P.J.A.D., the Honorable John L. Ard, J.A.D., and the Honorable Theodore W. Trautwein, J.A.D. affirmed petitioner's conviction. *State v. Hall, 183 N.J. Super. 224, 443 A.2d 767 (App. Div. 1981).* The Court held that a judge of the Superior Court has the power to issue an order compelling a suspect who has not been arrested or indicted to appear in a lineup, based upon a presentation by the prosecutor of facts establishing a well-founded suspicion that the suspect was implicated in the crime being investigated. *183 N.J.Super. at 231, 443 A.2d at 767-768.*

Petitioner filed a petition for certification to the New Jersey Supreme Court, which was granted by that court on May 4, 1982. After additional briefs were filed and argument heard, the Supreme Court of New Jersey unanimously affirmed the ruling of the Appellate Division. *State v. Hall, 93 N.J. 552, 462 A.2d 115 (1983).*

SUMMARY OF ARGUMENT

Point I - The ability of the Superior Court of New Jersey, Law Division to issue process prior to arrest is a question which is resolved solely by resort to provisions of the New Jersey State Constitution.

Point II - Strictly limited pre-arrest detentions of suspects for non-testimonial identification procedures are proper on less than traditional probable cause to arrest, based upon this Court's decisions establishing a variable standard of probable cause.

REASONS FOR DENYING CERTIORARI

POINT I

THE JURISDICTION OF THE SUPERIOR COURT OF NEW JERSEY IS A QUESTION RESOLVED SOLELY ON THE BASIS OF THE NEW JERSEY STATE CONSTITUTION.

The issue of whether the Superior Court of New Jersey, Law Division has jurisdiction to issue process to compel a suspect to submit to nontestimonial identification procedures is purely a question of state consitutitional law. The Appellate Division of the Superior Court of New Jersey found that jurisdiction arose from the inherent power of the Law Division to hear criminal matters. *N.J. Const. (1947), Art. VI, sec. 3* pars. 2 and 3. *State v. Hall, 183 N.J. Super. at 224, 228-229; 443 A.2d at 767-768 (App. Div. 1981).* The New Jersey Supreme Court, acknowledged the utility of those provisions but relied more heavily on *N.J. Const. (1947), Art. 1, sec. 7* and also on the Fourth Amendment of the United States Constitution. 93 N.J. at 552, 557-559, 461 A.2d at 1158, (1983).

Clearly, the question of the jurisdiction of a state trial court is peculiarly a question of state law. In this case jurisdiction arises directly from the provisions of the New Jersey State Constitution despite the New Jersey court's reference to the Fourth Amendment. Art. 1, sec. 7 of the New Jersey Constitution, although worded nearly identically to the Fourth Amendment, has nevertheless been interpreted differently in many instances to provide greater protection for New Jersey citizens. See *e.g., State v. Valencia, 93 N.J. 126, 459 A.2d 1149 (1983)* (telephonic search warrants); *State v. Hunt, 91 N.J. 3381, 450 A.2d 952 (1982)* (availability of telephone toll records); *State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981)* (standing to litigate search and seizure claims). Thus, despite the passing reference to the Fourth Amendment, the decision clearly rests on independent and adequate state grounds. Under these circumstances this Court lacks jurisdiction to consider this issue. *Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469, 3475-3476 (1983).*

This conclusion is not altered by petitioner's attempt to couch this issue in terms of the court becoming unduly involved with the investigation of criminal cases and thus losing its ability to act as a neutral and detached protector of the constitutional rights of the citizens of New Jersey. (See P16-17). In the case at bar, the court acts to review evidence and determine whether sufficient evidence

citizens of New Jersey. (See P16-17). In the case at bar, the court acts to review evidence and determine whether sufficient evidence exists for process to issue just as it does when it authorizes a search warrant. This is not a situation where the court actively pursues an investigation and then issues process; a situation which this Court decried in *Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)* and *Coolidge v. New Hampshire, 407 U.S. 443 (1971)*. In *Lo-Ji*, the magistrate actually participated in the search which he authorized. Likewise, in *Coolidge*, the Attorney General actively investigated and prosecuted a case in which he had issued a search warrant as authorized by state law. Clearly, the procedures approved by the *Hall* court do not begin to put a judicial officer in the "dual" positions of the officials in *Lo-Ji* and *Coolidge*. The judge functions purely as a neutral and detached magistrate at all times. Thus, the problems of *Lo-Ji* and *Coolidge* are completely avoided.

In sum, respondent submits that the question of the State court's ability to issue pre-arrest process is solely one of state constitutional law. Thus, the New Jersey Supreme Court properly found such jurisidiction under the state constitution.

POINT II

THE SUPREME COURT OF NEW JERSEY PROPERLY AUTHORIZED STRICTLY LIMITED INVESTIGATIVE DETENTIONS BASED UPON LESS THAN PROBABLE CAUSE.

In *State v. Hall, supra*, the New Jersey Supreme Court in a unanimous decision sanctioned the investigative detention of a suspect for nontestimonial identification purposes based upon less than probable cause. The Court ruled that a lower court has the authority to authorize an investigatory detention provided these four requirements are met:

1. There must be sufficient evidence to demonstrate that a particular crime has occurred, is unsolved and is under investigation.

2. It must be demonstrated that there is a reasonable and well-grounded basis to believe that the individual sought as the subject of an investigatory detention may have committed the crime under investigation.

3. It must be shown that the results of the detention will significantly advance the criminal investigation and will serve to determine whether or not the suspect probably committed the crime.

4. It must appear that the investigative results cannot otherwise be obtained.

See *93 N.J. at 561-562, 461 A.2d at 1160.*

The conduct of the investigatory detention must be carefully circumscribed by additional procedural safeguards according to the Court. The detention and accompanying intrusion must be accomplished in a manner which insures the least amount of harassment of, interference with, or prejudice to the suspect. In most cases notice of the proposed detention must be given to the suspect, and the suspect should be given the opportunity to arrange a convenient time for the detention and to have counsel present. *93 N.J. at 564-565, 461 A.2d at 1161-1162.*

The Supreme Court of New Jersey viewed its ruling as flowing from decisions of this Court which delineate a variable probable cause standard. *93 N.J. at 561-565, 461 A.2d at 1161-1162.* The New Jersey

court balanced law enforcement concerns against the individual's Fourth Amendment rights and enunciated a decision which provides for a reasonable method of effectuating both interests.

It is clear that the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a court to balance the need for the particular search against the invasion of personal rights that each entails. *Bell v. Wolfish, 441 U.S. 520, 559 (1979).* Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted. See *e.g., United States v. Place, ____ U.S. ____, 103 S.Ct. 2637 (1983); Bell v. Wolfish, supra; United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967).* All of these factors were considered by the New Jersey Supreme Court in arriving at its conclusion that the decisions of this Court provided a basis for finding that a brief detention for nontestimonial identification purposes based upon an evidential finding of less than probable cause to search or arrest a suspect was reasonable.

In so ruling, the New Jersey court was merely following the lead of this Court. Most authorities agree that the real impetus for the concept of detention sanctioned by less than probable cause was Justice Jackson's dissent in *Brinegar v. United States, 338 U.S. 160, 180 (1949).* See, *e.g., La Fave, "'Street Encounters' and the Constitution: Terry, Sibron, Peters, and Beyond," 67 Mich.L.Rev. 40, 57-58, 65 (1968).* In *Brinegar,* Justice Jackson discussed the readiness of the majority to permit the search of Brinegar's vehicle because it was involved in a crime:

> But if we are to make judicial exceptions to the Fourth Amendment for these reasons [*i.e.*, the automobile's ready adaptation to use in a criminal endeavor], it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to maintain such an action executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save

> a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. *[338 U.S. at 182-183].*

This concept of variable probable cause languished, however, until 1967, when this Court decided *Camara v. Municipal Court, 387 U.S. 523 (1967)*, and *See v. Seattle, 387 U.S. 541 (1967)*. Both of these cases concerned the freedom of cities' building code inspectors to examine structures for latent defects. This Court rejected the notion that warrants were unnecessary, but observed that "there can be no ready test for determining reasonableness [of the warrant] other than by balancing the need to search against the invasion which the search entails." *387 U.S. at 536-537.* "'Probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied...." *Id. at 538.* It was at this juncture that this Court established the concept of variable probable cause, noting that such "[administrative] standards [could] vary with the municipal program being enforced...." *Id.*

Moreover, this Court held that varying the test of probable cause from that applied to criminal cases would not weaken the Fourth Amendment:

> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. *** [Such an approach] merely gives full recognition to the competing public and private interest here and, in so doing best fulfills the historic purpose behind the constitutional right to be free from unreasonable government intrusions of privacy. *[387 U.S. at 539].*

It took only one year for this Court to apply its new, variable probable cause concept to criminal law. *Terry v. Ohio, supra*, was the case through which it spoke.

Terry presented a narrow question: "[Is it] always unreasonable for a policeman to seize a person and subject him to a limited search for weapons [if there is no] probable cause for an arrest[?]" *392 U.S. at 15.* Chief Justice Warren's answer for the Court was, "No," and

Terry sanctions a brief detention commonly labeled a "stop and frisk." In reaching this conclusion, the Court emphasized the need "'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *392 U.S. at 20-21*, citing *Camara v. Municipal Court, supra.* (Interpolations are the Court's).

If *Terry* legitimized brief street detentions and superficial searches on less than probable cause, *Davis v. Mississippi, 394 U.S. 721 (1969)*, quite clearly invited longer, off-the-street detentions on less than probable cause. In *Davis*, this Court reversed the rape conviction of Davis whose fingerprints (which plainly linked him to the crime) were obtained when he and 23 other men were caught in a dragnet, although there was no probable cause to suspect any of them.

Justice Brennan, who authored the majority opinion, nevertheless ruled that detentions for fingerprints might, "under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *394 U.S. at 727.* This conclusion was predicated partially upon the relative innocuousness of the intrusion. *Id. at 727-728.*

Dunaway v. New York, 442 U.S. 220 (1979), and *Brown v. Illinois, 422 U.S. 590 (1975)*, are fully consistent with the precedent supporting the use of investigative detention. In *Dunaway*, the defendant was "picked up" on the strength of a third-hand informant's tip in regard to a robberty/homicide which took place several months before. The defendant was brought to police headquarters and interrogated after being given the warnings required by *Miranda v. Arizona, 384 U.S. 436 (1966). 442 U.S. at 203.* This Court emphatically rejected any standard short of "probable cause" for an involuntary custodial interrogation. *442 U.S. at 216.* See Comment, *"Custodial Seizures and the Poison Tree Doctrine: Dunaway v. New York and Its Aftermath," 13 J. Marshall L. Rev. 733, 748 (1980).* The *Dunaway* Court stressed that it was the scope and intensity of the police seizure of the defendant which triggered the probable cause requirement of the Fourth Amendment. *Dunaway v. New York, 442 U.S. at 213-216.* The defendant in *Dunaway* was dragged out of a neighbor's home and incarcerated for eight hours during which period he was subjected to interrogation. The seizure in *Dunaway* possessed all the "trappings" of a traditional arrest.

The limitation of *Dunaway* to "arrest" situations was subsequently highlighted by this Court in *Michigan v. Summers, 452 U.S. 692 (1981)*. In that case, that defendant was detained by the police upon less than probable cause while they searched a house pursuant to a search warrant. This Court found this detention was substantially less intrusive than that of *Dunaway*. In reviewing its holding in *Terry* and its progeny this Court noted that:

> In these cases, as in *Dunaway*, the Court was applying the ultimate standard of reasonableness embodied in the Fourth Amendment.... [T]hey demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests **is not confined to the momentary, on-the-street detention** accompanied by a frisk for weapons involved in *Terry* and *Adams*. [Emphasis added]. *452 U.S. 692, 699-700.*

As noted previously, the touchstone of Fourth Amendment analysis remains "reasonableness"; that is, it depends on a balance between the public interest and the individual's right to personal security. *Bell v. Wolfish, supra; Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976)*. It is the application of this "reasonableness" test which apparently has led this Court to hold that law enforcement officers, acting without any prior judicial approval, are constitutionally entitled to restrict the liberty of suspects during a brief period of "investigative detention," upon a reasonable belief, based on articulable facts, that an offense has been committed and that the individual has committed the offense or can provide assistance in solving the crime. See, *e.g., United States v. Place, supra; Michigan v. Summers, supra; Brown v. Texas, 443 U.S. 47 (1979)*.

The *Hall* court has followed these decisions and added the additional protection of prior judicial approval for these police actions. Judicial review and sanction of pre-arrest lineups or other forms of nontestimonial identification procedures provides a number of salutary effects. One of the functions of the judiciary in overseeing the criminal process is to curtail and prevent police overzealousness from impinging upon the constitutional rights of suspects. See generally *Kirby v. Illinois, 406 U.S. 682, 690-691 (1972); United States v. Wade, 388 U.S. 218 (1967)*. The procedures sanctioned by the *Hall* Court permit early review of police actions and, where appropriate, will provide detailed guidelines (see *93 N.J. at 561-565, 461 A.2d at 1161-1162)* for future police actions. This ensures that a judicial

officer will carefully review the grounds for, and limit the extent of, any detention. Furthermore, the value of such evidence is well established. See generally Note, *"Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure,"* *72 Cal.L.Rptr. 712, 732 (1972)*. Obviously, if there is probable cause to believe that a suspect has committed a crime, the police may arrest him and place him in a lineup or subject him to other forms of nontestimonial identification.

In this case, as with other nontestimonial identification procedures, there arises a situation which is less intrusive than that in *Dunaway*. The detention sanctioned here was brief, and based upon considerably more evidence than unsubstantiated hearsay. Defendant Hall was accompanied by counsel and permitted to challenge the order. No interrogation occurred, and most importantly, unlike the situation in *Dunaway*, the procedures in question here were authorized by a neutral and detached magistrate. *State v. Hall, 93 N.J. at 566, 461 A.2d at 1162-1163.*

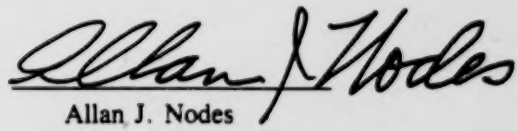
In sum, respondent submits that the decision in *Hall* represents a reasonable application of the standards set forth in the decisions of this Court. Clearly, the public's need to solve crimes justifies the limited intrusion into the rights of a suspect which *Hall* allows. The procedures sanctioned in *Hall* merely represent a reasonable application of principles set forth in the decisions of this Court. There is no question that they fully comport with the requirements of the Fourth Amendment.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY

By: 

Allan J. Nodes
Deputy Attorney General
Deputy Chief, Appellate Section

ALLAN J. NODES
DEPUTY ATTORNEY GENERAL

OF COUNSEL

DEBRA L. STONE
DEPUTY ATTORNEY GENERAL

ON THE BRIEF

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No. 83-427

In The

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Respondent,

-vs-

JAMES H. HALL, JR.,

Petitioner.

On Petition for Writ of Certiorari
to the Supreme Court of New Jersey

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STUART SURICK
3735 Lawrenceville Road
Princeton, New Jersey 08540
(609) 924-3993

Attorney for Petitioner

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 383
Cranbury, N.J. 08512
Area Code 609
443-4202

QUESTIONS PRESENTED

1. Whether the question of the jurisdiction of the New Jersey court to create a **per se** procedure whereby a citizen is compelled to submit to a lineup on less than probable cause, without *Miranda* warnings or the right to effective counsel, must be resolved on the basis of federal law.

2. Whether a procedure whereby a citizen is detained and compelled to submit to a linup on the basis of the bare allegations of a police officer, without *Miranda* warnings or bail, on less than probable cause, and without any means of challenging the officer's allegations, deprives a citizen of Fourth, Fifth, Sixth, and Fourteenth Amendment rights.

TABLE OF CONTENTS

PAGE

Questions Presented i
Table of Contents ii
Table of Citations iii
Reasons for Granting the Petition 1
Conclusion 6

TABLE OF CITATIONS

PAGE

CASES CITED

Aguilar v. Texas, 378 U.S. 108 (1964).....5
Davis v. Mississippi, 394 U.S. 721 (1969).....5
Dunaway v. New York, 442 U.S. 220 (1979).....5
Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317 (1983).....5
Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469 (1983).....2
Michigan v. Summers, 452 U.S. 692 (1981).....5
Miranda v. Arizona, 384 U.S. 436 (1966).....1
Spinelli v. United States, 393 U.S. 410 (1969).....5
State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981).....2
State v. Hall, 183 N.J. Super. 224, 443 A.2d 767 (App. Div. 1981) aff'd., 93 N.J. 552, 462 A.2d 115 (1983).....1,passim
Terry v. Ohio, 392 U.S. 1 (1968).....5

UNITED STATES CONSTITUTION CITED

Fourth Amendment.....1,passim
Fifth Amendment.....2,passim
Sixth Amendment.....2,passim
Fourteenth Amendment.....2,passim

NEW JERSEY CONSTITUTION CITED

N.J. Const. (1947) Art. I, par.7.....1,2

OTHER SOURCES CITED

Brennan, "State Constitutions and the Protection of Individual Rights", 90 Har. L. Rev. 489 (1971).....2

No. 83-427

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Respondent,

vs.

JAMES H. HALL, JR.,

Petitioner.

On Petition for Writ of Certiorari
to the Supreme Court of New Jersey

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

REASONS FOR GRANTING PETITION

1. Respondent contends that this Court is without jurisdiction to review the question of the jurisdiction of the New Jersey court to compel a suspect to submit to a linup on less than probable cause. Respondent explains that the decision below rests on independent and adequate state grounds, and that the New Jersey court merely makes "passing reference" to the Fourth Amendment while basing its decision on Article I paragraph 7 of the New Jersey Constitution.

A review of the opinion below reveals numerous references to the Fourth Amendment and to the decisions of this Court. *93 N.J. 552, 556 to 559.* The opinion below is "interwoven with federal law," both Constitutional and decisional. See *Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469, 3475-3476 (1983).* It contains no statement that the federal cases and constitution are used only for "guidance". Consequently, in accordance with the standards evinced in *Michigan v. Long, supra,* this Court clearly has jurisdiction.

Although Article I paragraph 7 of the New Jersey Constitution of 1947 is taken almost verbatim from the Fourth Amendment, it is recognized that the New Jersey court may afford New Jersey citizens greater protection against unreasonable searches and seizures than may be required by this Court's interpretation of the Fourth Amendment. *State v. Alston, 88 N.J. 211 at 225 (1981; Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv L. Rev. 489 (1977).* In fact, the procedure created by the New Jersey court denies citizens the protections of the Fourth, Fifth, Sixth and Fourteenth Amendments although purporting to afford protection against unreasonable searches and seizures. For this reason also, this Court has jurisdiction.

2. The constitutional inadequacy of the "evidential standards" formulated by the New Jersey Court is the subject of a segment of the Petition for Writ of Certiorari at bar (pages 24 to 29). The inadequacy of the "procedural safeguards" is demonstrated below.

The New Jersey Court states that the suspect should be given "the **opportunity** to have counsel present during the detention." (Emphasis added) *93 N.J. at 565.* This language advises that it is only by favor and not by constitutional right that a suspect may have counsel.

The procedural safeguards contain no requirement that *Miranda* warnings be given at the time of the initial state action in serving the process mandating the detention. A citizen is provided no notice of the right to remain silent, the right to retain counsel, or the right to have counsel furnished if he cannot afford representation.

Describing the lineup, the New Jersey court states, "Defendant, accompanied by counsel, was **permitted** to contest the motion." (Emphasis added) *93 N.J. at 566.* Omitted from the opinion is the fact that defendant was afforded neither rights to discovery nor the opportunity to present witnesses or confront his accusors. Counsel, therefore, had no opportunity to ascertain and present underlying facts

as to credibility, mistake, or suggestibility. Although a nontestimonial hearing, as on a motion, was held, as no discovery was provided and counsel was not permitted to ask even one question before the court of the affiant detective, the right to **effective** legal representation was denied.

Had the opportunity to effective representation been accorded, the affidavit could have been readily impeached:

(1) As the "intruders" were leaving, one of them told Bailey (the alleged male victim) that they would return his television set and stereo when they received money owed to them by **Michael Huff**. (Emphasis added) *93 N.J. at 555.* The affidavit, however, states, "the perpetrators told the victims, "You tell **Louie**, we get our money back, you get your stuff back." (Emphasis added). (Da 5)[1]. As it developed, Michael Huff did not know Mr. Hall (3T 307-308)[2]. Consequently the issuing magistrate was misled to believe the alleged **res gestae** remarks of the perpetrators were inculpatory, when in fact they were exculpatory. Huff, in fact, suggested another suspect.

On viewing the composite of the white male perpetrator, prepared at the instruction of Bailey and Dillon, Huff advised Booket that it resembled John Bennis, who left for Mississippi in a U Haul on February 3, 1978, hours after the robbery. The defense eventually learned from Michael Huff that Bailey described the white male perpetrator to him (Huff) as having dark hair and dark beard (Da 37, 9-13). Mr. Hall is blond.

Detective Booket had in his possession a photograph of John Bennis (3T 312). However, he never showed Bailey or Dillon the photograph of Bennis (3T 288) nor did he attempt to trace Bennis (3T 286-22 to 288-10).

Although Michael Huff provided information which was exculpatory as to Mr. Hall, the affidavit relates only that a polygraph was administered to Huff, and that the results of the test corroborated Louis Campanelli's story (Da 4). In fact, after interviewing Huff, Booket called Bailey and Dillon back to the police department. Bailey and Dillon then admitted to the drug transaction. (3T 290-22 to 291-4). This was omitted from the affidavit.

It is also noteworthy that neither Bailey, Dillon, Campanelli, Huff or any of their cohorts were ever prosecuted for their admitted crimes.

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1 Da refers to the appendix of petitioner's brief before the Superior Court of New Jersey, Appellate Divison.

2 3T refers to Volumes I and II of the trial transcript.

(2) Stacey Dillon, the alleged female victim, on viewing the photolineup identified a photograph of Michael Gonshark as that of the white male perpetrator. (3T 56-15 to 58-10). The affidavit misleadingly states, that on viewing the photolineup, Stacey Dillon "was unable to identify the perpetrator of the crime." (Da 5). Apparently, the police never investigated Michael Gonshark.

(3) Early in the investigation, Louis Campanelli was interviewed by Detective Wicklund of the Aberdeen Township Police Department. Detective Wicklund's report, made in connection with that interview, stated, "This *Hall* holdup was over a drug rip-off" (Emphasis added). At trial, Detective Wicklund admitted that at the time of the interview, Mr. Hall was not a suspect, nor was his name ever mentioned, but stated that the *Hall* holdup was intended to be the **whole** holdup (3T 508-1 to 10; 3T 14-19 to 25).

From the foregoing, it is clear that Detective Booket deleted crucial exculpatory materials known to him at the time of preparation of the affidavit. From the information which was in the possession of the police, it would appear that they were determined to implicate Mr. Hall. Had counsel been accorded rights to discovery and confrontation, these underlying facts could have been presented to the issuing magistrate. However, by denying the right to effective representation, the New Jersey court has created a **per se** procedure permitting the police to detain citizens and require them to submit to a linup on the basis of a paper warrant.

Further examination of the affidavit reveals the paucity of the evidence therein:

(1) There was no identification by the victims of Mr. Hall's photograph. The photoarray shown to Bailey and Dillon contained a then eight year old photograph of Mr. Hall, taken when Mr. Hall had been arrested for a charge which was administratively dismissed by the prosecutor without accusation or indictment. On viewing the photoarray, Bailey was uncertain and Dillon pointed out another photograph. (Da 5).

(2) The affidavit relates that the affiant detective (Booket) had been advised that an informant had stated that the composite of the white male perpetrator resembled James Hall. (Da 4). The informant was not personally known to Booket and the affidavit did not contain any information attesting to the informant's reliability or veracity. Nor did Booket receive information directly from the informant as to the basis of the informant's knowledge. Clearly, the information

allegedly supplied by the informant would not have satisfied the *Aguilar-Spinelli* test operative at the time, or the *Illinois v. Gates* test. See *Illinois v. Gates, 103 S.Ct. 2317 (1983), Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).*

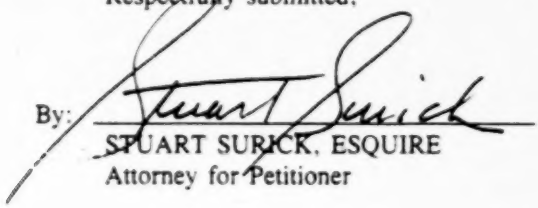
Viewing it in its entirety, the evidence in the affidavit clearly falls short of **any** evidential standard heretofore required by this Court to sustain a Fourth Amendment search and seizure. Respondent's claim that the New Jersey court has followed the decisions of this Court and added the protection of prior judicial approval is misleading and false. As a citizen is afforded no realistic opportunity to challenge the affidavit, the procedure abases the judiciary to the role of investigatory police. While satisfying the New Jersey court's standards, a magistrate reviewing an application for a lineup detention may sanction a lineup based on the speculation of an overzealous police officer or the contrivances of an ambitious prosecutor. The latter would be immune from later liability for abuse of process while the innocent citizen is harassed and his reputation blemished.

No investigative detention sanctioned by this Court heretofore is comparable to the detention herein. The *Terry* stop and frisk pertains to an exigent protective search for weapons. See *Terry v. Ohio, 392 U.S. 1 (1968).* The incidental detention of *Michigan v. Summers, 452 U.S. 692 (1981),* was permitted only because of the juxtaposition of occupants to the execution of a traditional probable cause search. Although the *Dunaway* Court does not address detentions pursuant to a warrant, that opinion would certainly proscribe an investigative arrest on less than probable cause where rights to bail and *Miranda* warnings are denied. *Dunaway v. New York, 442 U.S. 200 (1979).* And certainly the *Davis* Court (*Davis v. Mississippi, 394 U.S. 721 (1969)* did not contemplate that the New Jersey court would clone its suggestion that under narrowly defined circumstances, detention for fingerprinting on less than traditional probable cause may be permissible, to create a **per se,** less than probable cause procedure for detention for lineup purposes, where factors of human error, psychology and motivation come into play, and a citizen is denied the protections of the Fourth, Fifth, Sixth, and Fourteenth Amendments.

CONCLUSION

For the reasons set forth in the petition for certiorari and in this reply brief, petition for writ of certiorari should be granted.

Respectfully submitted,

By: 

STUART SURICK, ESQUIRE
Attorney for Petitioner

DATED: November 28, 1983